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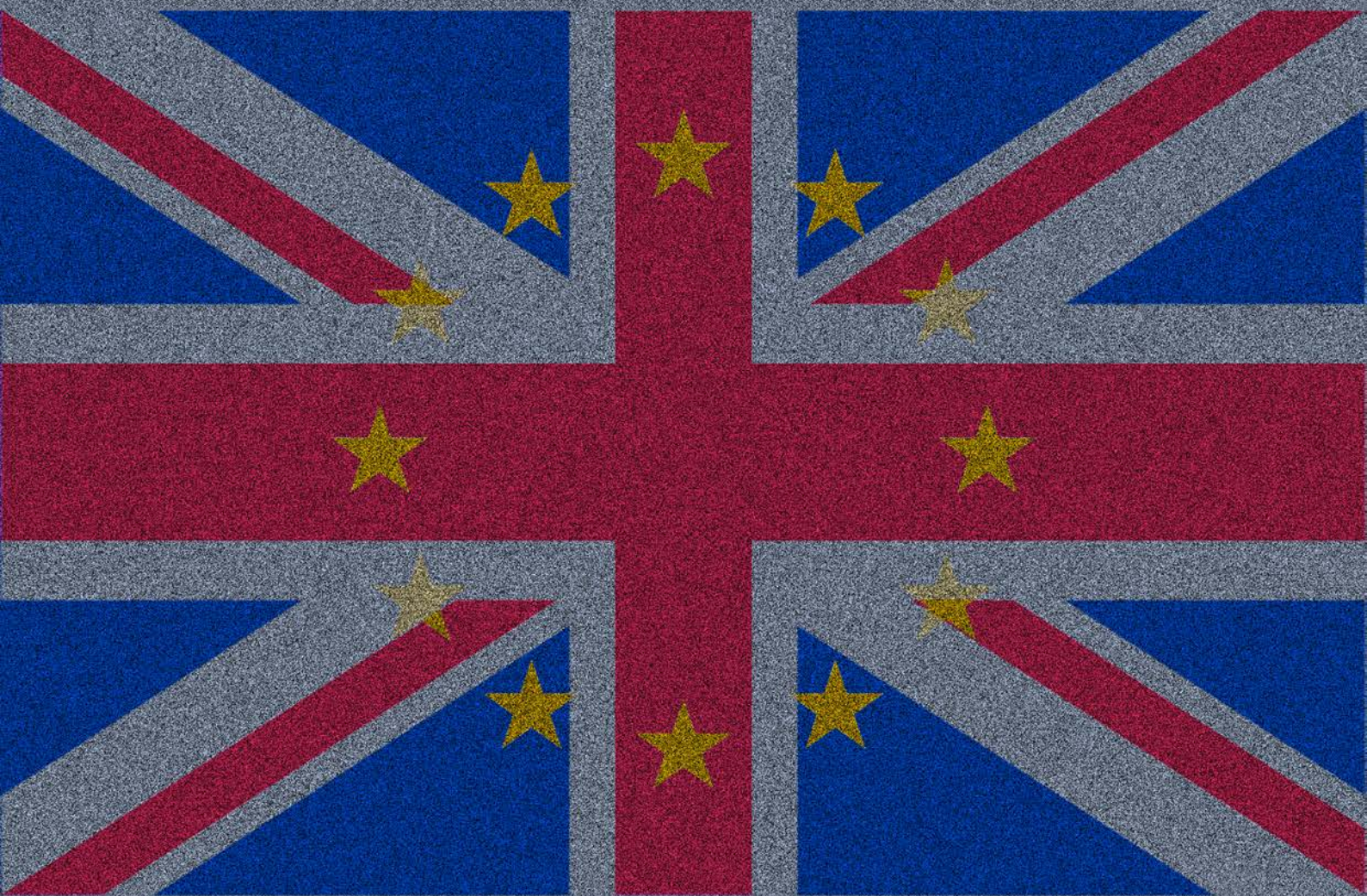
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**The legal implications of a repeal of the
Human Rights Act 1998
and withdrawal from the
European Convention on Human Rights**



**A policy paper edited by
Kanstantsin Dzehtsiarou and Tobias Lock**

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Executive summary

The aim of this policy paper is to explain the mechanism and consequences of repealing the Human Rights Act 1998 and withdrawal from the European Convention on Human Rights.

The key points of the policy paper are:

- The Human Rights Act could be repealed by Act of Parliament.
- Any attempt to repeal and/or replace the Human Rights Act would have to take into account the devolution settlement.
 - A repeal of the Human Rights Act might require the consent of the devolved legislatures under the Sewel Convention.
 - A repeal of the Human Rights Act would at present run counter to the UK's international treaty obligations under the British-Irish Agreement which was incorporated in, and agreed as part of the UK-Ireland obligations under the Belfast (Good Friday) Agreement.
 - A new British Bill of Rights may require the consent of the devolved legislatures.
- If the Human Rights Act were not replaced, individuals would still be able to rely on common law remedies, as far as they exist, as well as the EU Charter of Fundamental Rights in cases in which the UK has acted within the scope of EU law. Hence, in some areas repealing of the Human Rights Act without replacement will not lead to the 'regaining of sovereignty' anticipated by the proponents of such proposals. If the UK remains a party to the European Convention on Human Rights the right to lodge a complaint with the European Court of Human Rights will still exist. The UK courts will not have a chance to deal with certain human rights issues internally as they will be escalated to the European Court of Human Rights in Strasbourg.
- A replacement of the Human Rights Act with a British Bill of Rights would enable Parliament to provide for the protection of additional rights, such as a right to trial by jury. It would also allow Parliament to introduce certain procedural changes, such as no longer making it mandatory for courts 'to take into account' the case law of the European Court of Human Rights or to read legislation 'as far as it is

possible to do so' compatibly with Convention rights. It should be noted, however, that the Supreme Court has relaxed the conditions under which courts are required to follow the European Court of Human Rights and that a removal of these requirements could result in an increased number of cases brought against the UK in the European Court of Human Rights.

- The UK would not be able to withdraw from the jurisdiction of the European Court of Human Rights while remaining a party to the European Convention on Human Rights, unless the Convention was amended. This would require the consent of all forty-seven contracting parties to the Convention.
- A complete withdrawal from the European Convention on Human Rights would deprive people in the UK from the possibility of bringing their human rights complaints to the European Court of Human Rights.
 - However, it would not relieve the UK of the duty to comply with judgments already handed down by the European Court of Human Rights, for instance on prisoner voting.
 - The UK would also be setting a negative example so that the protection of human rights within Europe as a whole would suffer.
- Withdrawal from the European Convention on Human Rights is technically possible with six months' notice, however it would lead to wider consequences for the UK's other international commitments.
 - Long-term membership of the Council of Europe may become impossible.
 - A withdrawal from the European Convention on Human Rights may be incompatible with the UK's commitments as a member of the European Union.
- Withdrawal from the European Convention on Human Rights could result in a substantial reduction of human rights protection for minority and vulnerable groups in the UK.

Foreword by the editors

The general election of 7 May 2015 has returned a Conservative government and, as a consequence, the Conservative Party's plans for reforming human rights law in the United Kingdom are likely to become reality. It is therefore important to discuss some of the legal implications of a repeal of the Human Rights Act and a withdrawal from the European Convention on Human Rights. Detailed discussions can already be found in numerous legal publications and many more are certain to follow in the near future. This paper provides an overview of some of the many legal questions that the Conservative Party's plans raise and attempts to provide some answers to these highly complex questions. It is deliberately kept short and does not claim to be exhaustive.

This policy paper is the product of a one-day workshop held at Edinburgh Law School on 13 February 2015 attended by Ed Bates, Christine Bell, Colm O'Cinneide, Fiona de Londras, Sir David Edward, Alan Greene, Paul Johnson, and the editors. The text of this paper was produced by the editors from the contributors' oral presentations and discussion. The editors take full responsibility for the accuracy of this report.

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Kanstantsin Dzehtsiarou and Tobias Lock,
Edinburgh and Guildford, 12 May 2015.

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General introduction

On 3 October 2014, the Conservative Party published its policy document 'Protecting Human Rights in the UK' which sets out its proposal to repeal the Human Rights Act 1998 (HRA) and replace it with a new 'British Bill of Rights and Responsibilities'. In addition, the policy document also raised the prospect that the UK might withdraw from the European Convention on Human Rights (ECHR). The policy document outlines three main problems with the HRA:

- First, the HRA is said to undermine the role of UK courts when deciding human rights cases. The requirement that national judges 'take into account' European Court of Human Rights (ECtHR) jurisprudence is said to lead to the application of 'problematic Strasbourg jurisprudence' in UK law.¹
- Second, it is said that the HRA 'undermines the sovereignty of Parliament, and democratic accountability to the public.'² Although the HRA affirms the sovereignty of Parliament, it is alleged that the requirement in section 3(1) of the HRA to interpret legislation in a way which is compatible with ECHR rights, 'so far as it is possible to do so', has led to UK courts going to 'artificial lengths to change the meaning of legislation so that it complies with their interpretation of Convention rights'.³
- Third, the HRA is said to go beyond what is necessary under the ECHR because the ECHR does not require the UK to have any particular legal mechanism for securing ECHR rights, to directly incorporate ECHR rights into UK law, or to make ECtHR jurisprudence directly binding on domestic courts.

The position on the UK's continued membership of the ECHR is less clearly formulated. The policy document expresses a general desire for the UK to remain part of the ECHR, but only if 'the Council [of Europe] will recognise these changes to our Human Rights laws'. This means that the Council of Europe would have to accept a British Bill of Rights and Responsibilities that would, among other things, break the formal link between British courts and the ECtHR. Moreover, it appears that the Council of Europe would be

¹ Conservative Party, 'Protecting Human Rights in the UK' 4.

² Conservative Party, 'Protecting Human Rights in the UK' 4.

³ Conservative Party, 'Protecting Human Rights in the UK' 4.

asked to accept that ECtHR judgments would be treated as advisory only. The latter proposal is legally impossible as it directly contradicts Article 46 of the Convention and it will require amendment of the Convention to which all other 46 Contracting Parties must agree. The policy document contains the warning that in 'the event that we are unable to reach that agreement, the UK would be left with no alternative but to withdraw from the European Convention on Human Rights, at the point at which our Bill comes into effect'.⁴

The Conservative Party's election manifesto repeated the party's intention to 'scrap' the HRA and replace it with a 'British Bill of Rights'. It also promised to 'curtail the role of the European Court of Human Rights' but, in contrast to the policy document from October 2014, does not mention withdrawal from the ECHR.⁵ Therefore, it may be presumed that withdraw from the ECHR is not a manifesto commitment and, for this reason, an imminent withdrawal is less likely. However, some of the objectives which a British Bill of Rights would be designed to achieve – such as to ensuring 'that our Armed Forces overseas are not subject to persistent human rights claims'⁶ or preventing 'terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation'⁷ – could run counter to the ECHR, and as a result, make long-term membership of the ECHR difficult.⁸ Both of these commitments are inconsistent with current ECtHR case law.⁹

This policy paper examines how a repeal of the HRA and a withdrawal from the ECHR could be effected and some of the significant consequences this would have for 1) human rights protection in the UK, and 2) the UK's international commitments.

⁴ Conservative Party, 'Protecting Human Rights in the UK' 8.

⁵ Conservative Party Manifesto 2015, 58, 60,

⁶ Conservative Party Manifesto 2015, 77; such claims are possible under the conditions formulated e.g. in *Al-Skeini and Others v United Kingdom* ECHR 2011.

⁷ Conservative Party Manifesto 2015, 73; this proposal might run counter to the ECtHR's body of case law on extradition.

⁸ In fact, Lord Faulks, Minister of State in the Ministry of Justice, is reported to have said that if the UK's relationship with the Council of Europe did not change, then we 'we will give six months' notice and leave or denounce the terms of the Convention', cf. Public Law For Everyone Blog, 23 April 2015, <http://publiclawforeveryone.com/2015/04/23/are-the-conservatives-still-contemplating-withdrawal-from-the-the-echr/> [accessed 6 May 2015].

⁹ See, *Saadi v. Italy*, [GC], Application No 37201/06 and *Al-Saadoon and Mufdhi v. the United Kingdom*, 61498/08.

Part I

Repeal of the Human Rights Act 1998

Introduction

In this part of the policy paper we will first examine how a repeal of the HRA might be achieved and, second, explore possibilities for what it could be replaced with. This part of the paper works on the assumption that the UK would remain a member of the Council of Europe, be bound by the ECHR, and be a member of the European Union.

1. How would repeal of the HRA take effect?

1.1 Procedural steps

Complete repeal of the HRA could be achieved by passing an Act of Parliament.

Some of the aims contained in the Conservative Party policy document could also be achieved by passing an Act of Parliament amending the HRA. For instance, the policy document formulates the aim of making judgments of the ECtHR 'no longer binding over the UK Supreme Court'. This aim seems to be directed at section 2 (1) of the HRA, which contains the requirement that courts 'take into account' the jurisprudence of the ECtHR. It should be pointed out that the suggestion that judgments of the ECtHR 'are binding' on the Supreme Court is flawed given that the clear wording of section 2 (1) HRA shows that they are not strictly binding *in domestic law*. Nonetheless, it would be possible to remove this requirement from the HRA by way of an amendment (although this would not change the binding character of ECtHR judgments *under international law* if they were handed down in cases brought against the UK). Certain adjustments to the HRA are therefore possible without the need to repeal the Act as whole. As a consequence, any amendments to the HRA may substantially change the operation of current HRA protections.

1.2 Implications of the devolution settlement

The HRA applies to all of the devolved nations of the UK, but is also embedded in the devolution settlement. For instance, section 29 (2) of the Scotland Act 1998 states:

A provision is outside that competence so far as any of the following paragraphs apply [...]

(d) it is incompatible with any of the Convention rights [...]

There is thus no competence for the devolved legislatures and executives to legislate or act in a way that is incompatible with 'Convention rights'.¹⁰ The definition of 'Convention rights' is expressly stated as being the same as that in the HRA.¹¹ The HRA is also listed among several other protected enactments that cannot be altered.¹² These examples are just part of the interrelationship between the HRA and the devolution Acts. The non-governmental organisation JUSTICE has described the 'very close relationship between the HRA and the devolution statutes' as 'a symbiotic relationship in the protection of human rights'.¹³ A key question, therefore, is in how far any repeal or amendment of the HRA would have to take account of the devolution settlement.

The first difficulty in respect of repealing or amending the HRA would be the need to gain the consent of the devolved administrations. While not formally binding, this requirement (known as the 'Sewel Convention') is set out in the Memorandum of Understanding between the UK government and the devolved administrations. It states:

The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.¹⁴

¹⁰ Northern Ireland Act 1998, sections 6(2)(c) and 24(1)(a); Scotland Act 1998, sections 29(2)(d) and 57(2); Government of Wales Act 2006, sections 81(1) and 94(6)(c).

¹¹ Northern Ireland Act 1998, sections 71(5) and 98(1)(b); Scotland Act 1998, section 126(1); Government of Wales Act 2006, sections 81(6) and 158(1)(b).

¹² Northern Ireland Act 1998, section 7(1)(b); Scotland Act 1998 Sched 4 Part 1 s 1(2); Government of Wales Act 2006, Sched 5.

¹³ JUSTICE, *Devolution and Human Rights* (February 2010) para 12.

¹⁴ Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013.

Consent is achieved in the devolved nations by the respective legislature passing a 'Legislative Consent Motion'.

While the HRA itself is a reserved (i.e. non-devolved) matter, human rights as such are not. The devolved legislatures and executives are expressly required to observe and implement 'obligations under the Human Rights Convention'.¹⁵ The legal situation in this respect is somewhat unclear. One could conclude that a wholesale repeal of the HRA might be possible without consulting the devolved legislatures, whereas any replacement of the HRA would arguably trigger the Sewel Convention. However, others have suggested that even a repeal of the HRA might require the consent of devolved legislatures.¹⁶

Any changes to the human rights provisions in the devolution Acts themselves would similarly trigger the Sewel Convention. Admittedly, Parliament can choose to ignore any convention but this would become harder if both the 'vow' made before the Scottish independence referendum (to make the Scottish Parliament 'permanent') and the recommendation of the Smith Commission (that the 'Sewel Convention be put on a statutory footing') were followed.¹⁷ The Smith Commission suggests that a new paragraph 8 be added to section 28 of the Scotland Act, which would read:

But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

While this provision would not create an insurmountable legal barrier for the Westminster Parliament and prevent it from legislating with regard to a devolved matter without the consent of the Scottish Parliament, it might make such legislation much more difficult to achieve if only politically.¹⁸ The potential difficulties are demonstrated by reports that a Scotland Office spokesman stated that repeal of the HRA would not be effective in

¹⁵ Northern Ireland Act 1998, Schedule 2, paragraph 3; Scotland Act 1998, Schedule 5.

¹⁶ JUSTICE, *Devolution and Human Rights* (February 2010) para 76.

¹⁷ Report of the Smith Commission for the future devolution of powers to the Scottish Parliament, November 2014.

¹⁸ See Mark Elliott, Public Law for Everyone Blog, 'The Draft Scotland Bill and the Sovereignty of the UK Parliament' 22 January 2015 <http://publiclawforeveryone.com/2015/01/22/the-draft-scotland-bill-and-the-sovereignty-of-the-uk-parliament/> [accessed 6 May 2015].

Scotland because it was 'built into the 1998 Scotland Act [and] cannot be removed [by Westminster]'.¹⁹

There is an additional, deeper issue regarding any change to the current devolution settlements given the great degree of legitimacy they possess following their approval by referenda. The current settlements set out a particular notion of sovereignty and an acceptance of what values hold the UK together. If the HRA were repealed this could be viewed as an erosion of the basis upon which power was devolved. One might therefore consider that a repeal of the HRA or substantial changes to it would require approval by referenda.

In the context of Northern Ireland, a possible repeal of the HRA would take on extra salience. Human rights protections, including the incorporation of the ECHR, were written into the Belfast (or Good Friday) Agreement, and into the British-Irish Agreement that underpinned it. The Agreement places the UK under an international treaty obligation to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention'.²⁰ The human rights framework established in the Agreement must be considered integral to the peace process in Northern Ireland. In practice, in the absence of a Northern Irish Bill of Rights (committed to in the Agreement, but not achieved), the HRA has an ongoing crucial function in Northern Ireland in terms of ensuring protection of rights, no matter who is in power within Northern Ireland. The ECHR has an important practical function in attempting to deal with the legacy issues from the troubles and in particular state involvement in deaths. Article 2 of the ECHR forms a part of Stormont House Agreement which, for example, states:

Processes dealing with the past should be victim-centred. Legacy inquests will continue as a separate process to the HIU [Historical Investigations Unit]. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the Executive will take appropriate steps to

¹⁹ David Maddox, 'Scotland exempt from Tories' Human Rights Act axe', *The Scotsman* (2 October 2014).

²⁰ Northern Ireland Peace Agreement (Good Friday Agreement) 1998, available at: <http://peacemaker.un.org/uk-ireland-good-friday98>

improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.²¹

The devolution settlements would therefore considerably complicate a repeal of the HRA and arguably form a bar to its replacement. It has also proved particularly important to gay and lesbian communities who face persistent attempts by the Northern Irish Assembly to institute discriminatory legislation (see freedom of conscience bill), and policy (cases on blood donation and adoption).

One way of circumventing the complexities created by devolution would be to repeal the HRA only in England. In the absence of any changes to the devolution Acts, the devolved legislatures might be in a position to adopt their own human rights guarantees if they chose to do so. If a repeal only took effect in England this would lead to human rights asymmetry in the UK. This might leave certain laws open to challenge in devolved nations that would not be open to challenge in England. This in turn would be likely to lead to fragmentation of human rights standards applicable in England as opposed to, for instance, Scotland or Northern Ireland. While it would not have immediate detrimental effect it might deepen the divide between England and the devolved parts of the country and intensify centrifugal force and calls for independence of the devolved nations of the United Kingdom.

2. What might the HRA be replaced with?

This section discusses the two main options available to a government seeking to repeal (rather than amend) the HRA: first, that the HRA is repealed and no legislation is enacted to replace it; second, that the HRA is repealed and replaced with a British Bill of Rights or a similarly named Act of Parliament.

2.1 No replacement of the HRA

Were the UK to repeal the HRA it could still remain a party to the ECHR. Repeal of the HRA would not automatically place the UK in breach of the ECHR. However, the main challenge before the entry into force of the HRA in 2000 was that it was often not

²¹ Stormont House Agreement (2014), para 31.

possible for individuals to rely on ECHR rights in domestic courts. Prior to the HRA, domestic courts were more restricted in the types of remedies they could award a claimant and, as a result, could not always avoid breaches of ECHR rights. The HRA thus had the effect of 'bringing rights home'.

2.1.1 Common law protection

Before the entry into force of the HRA civil liberties were protected under the common law, but this protection was weak and inferior to that provided by the HRA. If the HRA were to be repealed and not replaced, there is no guarantee of a return to the situation before it entered into force. While initially, courts were reluctant to develop an autonomous rights jurisdiction, there appears to have been a shift in recent years. UK courts increasingly reference common law rights in their judgments, as opposed to those of the ECHR. This is evidenced in a number of cases.

In *Osborn v Parole Board*, Lord Reed noted:

[The Human Rights Act] does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.²²

Similarly, in *Kennedy v Charity Commission*, the Supreme Court made clear that the starting point in reaching a decision is the common law. Lord Mance stated:

Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law.... In some areas, the common law may go further than the Convention, and

²² *Osborn v Parole Board* [2013] UKSC 61, [57] per Lord Reed.

in some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.²³

This is also evident in terms of the remedies that the courts utilise, not just the substantive standards. In *Jones v Secretary of State for Justice*,²⁴ the Administrative Court used the remedies available in administrative law rather than turn to the HRA. Instead of examining the proportionality of the ban on a prisoner's books, the court examined whether the action was irrational. This ground of review would be available were the HRA repealed, although it does provide for the same depth of scrutiny as proportionality.

It is therefore possible that repeal of the HRA will not mean a return to the position before it entered into force. There is some evidence to suggest that the common law appears to have been influenced by the HRA and altered because of it. However, the protection offered by the common law (still) suffers from a number of inherent weaknesses and it therefore cannot be suggested that the common law would be able to offer a human rights protection that is equivalent to the HRA. First, Statutes are able to override common law rights when the Statute is clear and express. Second, it is difficult to identify the content of a common law right and consequently it can be difficult to prove that it has been breached. Moreover, proportionality as a ground for substantive review might no longer form a part of UK law. This might be seen as detrimental for individuals seeking judicial review given that it is a more intrusive form of review than those available in traditional English administrative law such as irrationality and unreasonableness.²⁵

²³ *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, [46] per Lord Mance.

²⁴ *R (on the application of Gordon-Jones) v Secretary of State for Justice and Governor of HM Prison Send* [2014] EWHC 3997 (Admin).

²⁵ But note the recent Supreme Court judgment of *Pham v Secretary of State for the Home Department* [2015] UKSC 19, which might herald a change in this regard and could be seen as introducing proportionality as a common law ground of review. See e.g. Mark Elliott, Public Law for Everyone Blog, 'Proportionality and Contextualism in Common-Law Review: the Supreme Court's Judgment in *Pham*' 17 April 2015, <http://publiclawforeveryone.com/2015/04/17/proportionality-and-contextualism-in-common-law-review-the-supreme-courts-judgment-in-pham/#more-2712> [accessed 8 May 2015].

Procedurally speaking, common law rights are less securely protected as UK courts have neither got a power to construe national measures as 'far as possible' (as under section 3 HRA) nor can they make a declaration of incompatibility (as under section 4 HRA).

Common law protection is therefore welcome as an additional protection, but cannot be a substitute for positive protection of rights by Statute.

2.1.2 EU law protection

Should the UK remain a member of the EU, this provides an avenue through which ECHR standards can continue to apply. The EU has its own Charter of Fundamental Rights that is considerably more extensive than the ECHR. The rights contained in the EU Charter of Fundamental Rights are to be given, at least, the same scope as those contained in the ECHR.²⁶ Thus, repeal of the HRA when the UK remains part of the EU would not entirely expunge ECHR rights from UK law. Domestic judges are empowered by EU law to interpret national legislation in accordance with the EU Charter of Fundamental Rights and have the power and duty to 'disapply' national measures if, in the case at hand, they cannot be interpreted consistently.

The EU Charter of Fundamental Rights, however, cannot be invoked before national courts in all situations. Only national measures that are 'implementing' EU law will be subject to review for their compatibility with the EU Charter of Fundamental Rights. To rely upon the Charter, a claimant must show that a human rights violation took place 'within the scope of EU law'²⁷; if not, the claimant would be confined to the common law.

There are instances when the Charter of Fundamental Rights can provide for stronger protection than the HRA in national law. For instance, in *Benkharbouche* provisions of the State Immunity Act 1978 could not be read compatibly with the ECHR resulting in the Court of Appeal issuing a declaration of incompatibility.²⁸ Yet as far as the State Immunity Act would have prevented remedies based on EU labour law from being applied, the

²⁶ Article 52(3) CFR 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

²⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105, para 21.

²⁸ *Benkharbouche* [2015] EWCA Civ 33, [2015] WLR(D) 83.

Court of Appeal was able to disapply the State Immunity Act on the basis of Article 47 of the EU Charter of Fundamental Rights and was able to grant the remedies sought.

2.2 Replacement with a British Bill of Rights

The Conservative Party argues for a replacement of the HRA with a British Bill of Rights. At one point there seemed to be cross-party consensus on the idea,²⁹ though this now seems to have waned.³⁰

This section considers what a British Bill of Rights would mean for the UK, premised on the assumption that the HRA would be repealed rather than supplemented.

2.2.1 Advantages and disadvantages of a British Bill of Rights

A Bill of Rights for the UK would potentially have an enhanced status and greater symbolic value than the HRA. It could be an opportunity to incorporate rights seen to derive from 'British soil' and might thus resonate better with UK legal culture and legal systems. Of course this argument ignores that the substantive part of the ECHR was drafted in close collaboration with British lawyers, but it seems that in the public discourse it is nonetheless often not perceived as 'British'. As a consequence a British Bill of Rights could be considered a 'home grown' human rights instrument and would not be as politically toxic as the HRA currently is. As discussed below, a home grown Bill would open up the opportunity to enhance the protection of certain rights and better reflect 'British values'.³¹ A British Bill of Rights could also provide the opportunity for Britain to alter the relationship between British courts and the ECtHR.

On the other hand, there are fears that a British Bill of Rights might secure less protection than is currently achieved under the HRA. A number of proposals exist that appear to dilute the current standard of human rights protection. For instance, the Conservative

²⁹ See for the Labour Party, *The Governance of Britain*, Cm 7170 (July 2007); for the Conservative Party, David Cameron, Leader of the Opposition, to the Centre for Policy Studies, "*Balancing freedom and security – A modern British Bill of Rights*", 26 June 2006; speech of Dominic Grieve, shadow Attorney General, to the Conservative Liberty Forum, "*Liberty and Community in Britain*", 2 October 2006; for the Liberal Democrats see Liberal Democrat Policy Paper 83, *For the People, by the People*, August 2007.

³⁰ See Sadiq Khan, 'Labour will shift power back to British courts', *The Observer* (3 June 2014).

³¹ It would also provide an opportunity to introduce express responsibilities, which could be used to to balance rights. However, this would probably lead to a reduction of human rights protection and should not therefore be considered a true advantage.

Party policy document notes certain limits and restrictions it would consider imposing. It suggests, for example, that 'a foreign national who takes the life of another person will not be able to use a defence based on Article 8 to prevent the state deporting them after they have served their sentence'.³² Furthermore, it suggests that "'degrading treatment or punishment"... has arguably been given an excessively broad meaning by the ECtHR in some rulings.'³³ This assumption however would only amend the definition of torture on the national level and would not alter international obligations of the UK government. Should the UK seek to depart from ECtHR jurisprudence on these issues, the UK would be in breach of the ECHR.³⁴ In practical terms it means that even if the national court is not going to find a violation of human rights, the applicant will be able to bring the claim to the ECtHR which will apply its higher standards and find a violation if such exists. This will only prolong the process and might cause the UK embarrassment in Strasbourg.

2.2.2 Potential substantive changes in a British Bill of Rights

There are not many concrete examples of what a British Bill of Rights would look like.³⁵ It is likely that a British Bill of Rights would contain a written 'catalogue' of rights spelling out their content and the possibilities of limiting them. It would thus differ from the HRA, which does not itself define any of the rights protected but makes reference to the ECHR instead. This limits the rights protected through the HRA to rights guaranteed in the ECHR. A British Bill of Rights would thus provide an opportunity for the inclusion of additional rights, some of which might be considered uniquely 'British'. Having said that, the political dynamic surrounding the possible repeal of the HRA suggests that rights protected will be curtailed rather than expanded. However, it is important to highlight possible areas of expansion.

First, a British Bill of Rights might include a freestanding right to equal treatment and non-discrimination. Under the current arrangements, Article 14 ECHR only guarantees a right to equal treatment in conjunction with the other rights protected by the ECHR.

³² Conservative Party, 'Protecting Human Rights in the UK' 6.

³³ Conservative Party, 'Protecting Human Rights in the UK' 6.

³⁴ As well as obligations under other international human rights instruments, such as the International Covenant on Civil and Political Rights or the UN Convention Against Torture.

³⁵ Notable exceptions are drafts by a working group chaired by Lord Lester QC in 1990 and by Martin Howe QC, which is part of the report by the Bill of Rights Commission; additionally the report by the Bill of Rights Commission contains many suggestions even though it does not provide a complete draft endorsed by the Commission, cf. Commission on a Bill of Rights. 'A UK Bill of Rights? The Choice Before Us' (December 2012).

Protocol 12 of the ECHR provides a general prohibition of discrimination that extends to any right set forth by law, but the UK has not ratified this and the HRA consequently does not refer to it. Instead, protection from discrimination in the UK is guaranteed primarily by equality legislation, such as the Equality Act 2010.

Second, a British Bill of Rights might be an opportunity to enhance due process rights, for instance by guaranteeing a right to a jury trial and ensuring open access to courts. This could be used to assuage concerns by some 'that its restriction in recent years by Parliament in cases involving, for example, jury tampering, fraud, and certain criminal charges relating to domestic violence has unacceptably undermined that right.'³⁶ However, as regards access to courts, it is not clear that a British Bill of Rights would alter the status quo or change current trends given that there are already a number of legitimate exceptions to jury trials laid down in the law which would most likely persist. So-called 'secret courts' and closed material procedures are quickly becoming a feature of UK law³⁷ and it seems unlikely a Bill of Rights would reverse this, in particular because the right would in all likelihood not be guaranteed as an absolute one.

Other suggestions have been made regarding rights fit for inclusion in a British Bill of Rights. For instance, a British Bill of Rights might allow for greater focus on individual freedoms and for a recalibration of human rights law to reflect the British libertarian tradition. It is questionable however whether an agreed framework of libertarian values exists. The Commission on a Bill of Rights also discusses the possibility for a British Bill of Rights to include socio-economic rights, environmental rights, rights of the elderly and children's rights.³⁸ Having said that, it is more likely that the British Bill of Rights will curtail the existing rights rather than offer new enhanced levels of protection.

2.2.3 Potential procedural changes of a British Bill of Rights

A Bill of Rights for the UK could alter how human rights are protected in the UK. At present, human rights are protected through a combination of mechanisms in the HRA. UK courts must read and give effect to all legislation '[s]o far as it is possible to do so ...

³⁶ Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (December 2012), para 8.38.

³⁷ See Justice and Security Act 2013.

³⁸ Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (December 2012), part 8.

in a way which is compatible with the Convention rights'.³⁹ If it is not possible to read a provision in a rights-compatible manner, a higher court⁴⁰ can make a 'declaration of incompatibility' under section 4 of the HRA. The inconsistent enactment will then still have to be applied in the case at hand, but the declaration triggers the possibility of a fast-track amendment procedure allowing the executive to assess whether and then how the legislation can be made compatible. This, it is argued, undermines the sovereignty of Parliament.⁴¹ A Bill of Rights would not necessarily have to contain provisions to this effect.

A Bill of Rights for the UK might remove the requirement that UK courts 'must take into account' the jurisprudence of the ECtHR.⁴² Both the Conservative and Labour Parties have criticised this requirement on the grounds that courts have interpreted the provision as essentially making Strasbourg jurisprudence binding.⁴³ While the Conservative Party has plans to remove this stipulation so that 'Britain's courts will no longer be required to take into account rulings from the Court in Strasbourg',⁴⁴ the Labour Party considers the introduction of guidance emphasising that British judges are free to disagree with Strasbourg jurisprudence.⁴⁵

Certainly, in the years immediately following the introduction of the HRA, British judges remained fairly cautious, following Strasbourg jurisprudence closely. A high-point was reached in *Ullah* where Lord Bingham set out the role of common law judges under section 2:

While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform

³⁹ Human Rights Act 1998, section 3.

⁴⁰ The courts are named in section 4 HRA, and include the Supreme Court, the Court of Appeal, the High Court, and the Court of Session.

⁴¹ See Conservative Party, 'Protecting Human Rights in the UK' 4.

⁴² S. 2 (1) HRA 1998.

⁴³ See Conservative Party, 'Protecting Human Rights in the UK' 4; Sadiq Khan, 'Labour will shift power back to British courts', *The Telegraph* (3 June 2014).

⁴⁴ Conservative Party, 'Protecting Human Rights in the UK' 6.

⁴⁵ Sadiq Khan, 'Labour will shift power back to British courts', *The Telegraph* (3 June 2014).

throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.⁴⁶

Yet, as noted above, a number of recent judicial decisions have started to move away from the constraints of the *Ullah* principle. In *R v Horncastle*,⁴⁷ Lord Phillips stated:

The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.

Similarly in *Manchester CC v Pinnock* Lord Neuberger stated:

The court is not bound to respect every decision of the [ECtHR]. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law.⁴⁸

In *Pinnock* Lord Neuberger defined considerably more relaxed conditions under which UK courts are expected to follow the ECtHR:

Where, however, there is a *clear and constant line of decisions* whose effect is not inconsistent with some fundamental substantive or procedural aspect of *our* law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line [emphasis added].⁴⁹

⁴⁶ *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

⁴⁷ *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373, [11] per Lord Phillips.

⁴⁸ *Manchester CC v Pinnock* [2011] UKSC 6, [2011] 2 All ER 586 [48] per Lord Neuberger.

⁴⁹ *Manchester CC v Pinnock* [2011] UKSC 6, [2011] 2 All ER 586 [48] per Lord Neuberger; a much more detailed discussion can be found in Ed Bates, 'The UK and Strasbourg: A Strained Relationship – The Long View' *forthcoming* in Katja S Ziegler, Elizabeth Wicks, Loveday Hodson (eds), *The UK and European Human Rights - A Strained Relationship?* (Hart, Oxford, 2015).

These more flexible interpretations of section 2 have recently been confirmed in the case of *Chester and McGeoch*.⁵⁰

For these reasons the Conservative Party's assumption that the case law of the ECtHR is binding on UK courts and that the Supreme Court is not supreme does not accurately reflect their current approach, so that the usefulness of a removal of section 2 HRA can be called into doubt. In addition, the criteria developed in *Pinnock* provide the UK courts with a good degree of flexibility, which can form the basis for a dialogue with the ECtHR on whether one of its judgments is correct.⁵¹ This has happened, for instance, in *Horncastle*.⁵² The UK Supreme Court decided not to follow an ECtHR precedent⁵³ which seemed to suggest the unqualified inadmissibility of hearsay evidence in a criminal trial because following it would have undermined 'the whole domestic scheme for ensuring fair trials'.⁵⁴ The Grand Chamber of the ECtHR subsequently took these concerns into consideration and relaxed its own approach.⁵⁵

A further procedural amendment in a British Bill of Rights could be to expand the definition of public authority. According to section 6 of the HRA a 'public authority' includes the following:

- (a) a court or tribunal, and
- (b) any person certain of whose functions are functions of a public nature... [unless] the nature of the act is private.

The increasing contracting-out and privatization of public services has led to problems in defining 'functions of a public nature'.⁵⁶ A Bill of Rights for the UK could take the

⁵⁰ *R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent) McGeoch (AP) (Appellant) v The Lord President of the Council and another (Respondents) (Scotland)* [2013] UKSC 63 (per Lord Mance at paras. 25-35; and with even more flexibility per Lord Sumption at paras. 120-124).

⁵¹ See Bates, n 48.

⁵² *R v Horncastle and others (Appellants)* [2009] UKSC 14.

⁵³ *Luca v Italy* ECHR 2001-II.

⁵⁴ *R v Horncastle and others (Appellants)* [2009] UKSC 14, per Lord Brown.

⁵⁵ *Al-Khawaja and Tahery v. the United Kingdom* ECHR 2011.

⁵⁶ See *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; *Aston Cantlow PCC v Wallbank* [2003] UKHL 37; *YL v Birmingham City Council* [2007] UKHL 27; [2007] 3 WLR 112; *R (Weaver) v London and Quadrant Housing* [2009] EWCA Civ 587; [2009] 4 All ER 865.

opportunity to clarify this. It should be noted, however, that all of these procedural changes could equally be effected by amending the HRA.

Conclusion

The HRA could be repealed by Act of Parliament. This would have to take into account the devolution settlement. This means in particular that a new Bill of Rights may only be possible with the consent of the devolved legislatures. A repeal may run counter to the UK's international obligations under the Belfast (Good Friday) Agreement. It may also have negative consequences for the uniformity of human rights standards across the nations of the United Kingdom. It could result in increased controversies and resentment between England on the one hand and Scotland, Wales and Northern Ireland on the other. It is important to note that there is ample scope for reform within the framework of the HRA if such reform is deemed politically expedient.

If the HRA were repealed and not replaced, individuals would still be able to rely on common law remedies, as far as they exist, as well as the EU Charter of Fundamental Rights in cases in which the UK has acted within the scope of EU law. Hence, in some areas repealing of the HRA will not lead to the 'regaining of sovereignty' anticipated by the proponents of such proposals.

If the HRA were repealed and replaced with a British Bill of Rights, Parliament would be able to provide for the protection of additional rights, such as a right to trial by jury. However, a plausible effect of the Bill of Rights is a limitation of existing rights. It would also allow Parliament to introduce certain procedural changes, for instance removing the possibility of declarations of incompatibility or the extension of the notion of 'public authority'.

Part II

Withdrawal from the European Convention on Human Rights

Introduction

As pointed out in the General Introduction, the Conservative Party election manifesto does not contain a commitment to withdraw from the ECHR. Yet some of the envisaged changes to human rights legislation in the United Kingdom might make such a withdrawal necessary in order to avoid a situation in which the UK is in constant breach of its international obligations. After a brief exposition of arguments for and against withdrawal, this paper will therefore briefly examine how a withdrawal from the ECHR could be achieved and what consequences it would have for continued membership in the Council of Europe and of the European Union. It will also address the implications of withdrawal for the individual.

1. Arguments for and against a withdrawal of the UK from the ECHR

1.1 Arguments for withdrawal

A number of arguments are advanced in favour of a withdrawal of the UK from the ECHR. Some relate to the workings of the ECtHR, such as its heavy caseload and resulting massive backlog of cases; it is in need of more lawyers in the registry, greater financial resources and clearer admissibility rules.⁵⁷ It is not these problems, however, which form the crux of arguments pushing for UK withdrawal from the ECHR.

At the heart of the debate over withdrawal is the sovereignty of the UK. It is argued that UK courts have become subservient to the ECtHR and that by being a member of the ECHR, the UK is bound by international law to comply with the judgments of the ECtHR and faces political consequences if not. This came to a head in cases regarding the ban on all convicted prisoners voting whilst in prison⁵⁸ as well as the prohibition on whole life sentences without the possibility of re-evaluation.⁵⁹

However, it is submitted that on closer inspection these are not strong enough arguments to militate in favour of withdrawal. As far as prisoner voting and whole life sentences are concerned, the impact of these judgments might be more limited than is

⁵⁷ Open Society Justice Initiative, 'Joint Statement: Strengthening the Protection of Human Rights in Europe' *Open Society Foundations* (6 March 2012).

⁵⁸ *Hirst v United Kingdom*, Appl no 74025/01 (ECtHR, 6 October 2005), (2006) 42 EHHR 41.

⁵⁹ *Vinter v United Kingdom*, Appl nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013).

often considered. Small changes to the status quo would most probably suffice to satisfy the requirements of the ECHR.

Moreover, it should be recalled that the relationship between UK courts and the ECtHR is a matter of domestic law, chiefly the interpretative obligation in section 2(1) of the HRA. As noted above however, the UK courts have moved on somewhat from the position in *Ullah* where they considered themselves bound to 'mirror' Strasbourg jurisprudence. There is an increased assertion of common law rights and cases such as *Horncastle* and *Pinnock* demonstrate how the ECtHR takes on board the opinions of domestic courts. In addition, if changes were desirable these could be brought in by amending the relevant provisions of the HRA.

What is more, as regards the role of the ECtHR sitting above the UK and exercising jurisdiction under the ECHR, the latter is likely to be reformed to contain an amendment to its preamble expressly referring to the margin of appreciation and subsidiarity in the Preamble to the ECHR.⁶⁰

Consequently the ECtHR has been said to be entering 'a new era in the life of the Convention, an age of subsidiarity, in which the emphasis is on States' primary responsibility to secure the rights and freedoms set out in the Convention'.⁶¹

1.2 Arguments against withdrawal

If the UK were to withdraw from the ECHR, those under the jurisdiction of the UK would no longer be able to bring their human rights complaints to the ECtHR. Moreover, the UK would no longer be bound to comply with the ECHR under international law.

Apart from reducing the human rights protections for individuals, there is also a broader systemic argument that the UK ought not to withdraw from the ECHR due to the damaging impact this might have on human rights protection in Europe in general. According to Sir Nicolas Bratza, former British judge at the ECtHR, support for the ECHR is essential for maintaining democracy and the rule of law in a number of state parties. He

⁶⁰ See Protocol No 15 to the Convention, which is open for ratification. It has been signed and ratified by the UK.

⁶¹ Joint Committee on Human Rights, Protocol 15 to the European Convention on Human Rights (Fourth Report of Session 2014-15, HL Paper 71, HC 837, 2 December 2014), 3.17.

notes already 'the corrosive effect in Russia and Ukraine of the failure to implement the *Hirst* judgment shows that compliance with the Convention obligations by the established democracies does matter.'⁶² The UK has a strong record of protecting human rights and its withdrawal could lead to disillusionment in the whole system. It could prompt other countries to leave, following the UK's example,⁶³ so that the system as a whole might collapse. It has even been suggested that Russia might set up a rival Eurasian human rights regime,⁶⁴ which would again weaken the protection available to people living in the countries partaking in it.

2. The procedure for withdrawal

Withdrawal from the ECHR is not the only option the UK might pursue. The UK could attempt to push for further reforms of the ECHR, e.g. in order to achieve that judgments were only declaratory. However, a withdrawal from only the ECtHR's jurisdiction would not be possible without a prior amendment to the ECHR. The ECtHR's judgments are binding on the parties so that the ECHR would need to be amended in order to render them merely advisory, i.e. not binding. This would require the consent of all 47 parties to the ECHR, which makes this an unlikely development.

If the UK wanted to withdraw from the ECHR it would need to denounce it in accordance with Article 58 ECHR [emphasis added]:

- 1 A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after *six months' notice contained in a notification addressed to the Secretary General of the Council of Europe*, who shall inform the other High Contracting Parties.
- 2 Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may

⁶² N Bratza, 'Living instrument or dead letter - the future of the European Convention on Human Rights' (2014) EHRLR2 116, 128.

⁶³ Report of the Joint Select Committee on the Draft Voting Eligibility (Prisoners) Bill (18 December 2013), para 109.

⁶⁴ L Helfer, 'The Successes and Challenges for the European Court, Seen from the Outside' *EJIL: Talk!* (May 14, 2014) <http://www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside/>.

have been performed by it before the date at which the denunciation became effective.

- 3 Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

If the UK government decided it wanted to withdraw from the Council of Europe as well as denounce the ECHR, the UK would need to give notice more than three months before the end of the Council of Europe's financial year or would have to leave next financial year.⁶⁵

The UK would cease to be bound by the ECHR once its denunciation becomes effective. However, it would remain bound by the ECHR for violations which occurred before that date. Crucially, it would still need to comply with all the judgments handed down against it in the past. This would, for instance, include the controversial *Hirst* judgment on prisoner voting rights.⁶⁶

3. What would be the wider consequences?

A withdrawal from the ECHR would not happen in isolation and yield further consequences for membership in the Council of Europe and of the European Union. Moreover, the human rights protection for individuals would suffer.

3.1 Continued membership of the Council of Europe

This section considers the consequences for the UK's membership of the Council of Europe of which the UK is a founding state, were the UK to denounce the ECHR. Upon denunciation of the ECHR, the UK would still remain a member of the Council of Europe as denunciation of the ECHR as such does not lead to automatic expulsion although if a country accedes to the Council of Europe now, it is a precondition that it signs the ECHR as well.

There are, however, implications for membership in the Council of Europe that stem from the potential lowering of human rights standards. Withdrawal from the ECHR could

⁶⁵ Statute of the Council of Europe, Article 7.

⁶⁶ *Hirst v United Kingdom (No 2)* ECHR 2005-IX.

eventually lead to suspension of membership or potentially expulsion from the Council of Europe if it is understood as a failure to cooperate or leads to the lowering of human rights standards below the level of what the ECHR requires. Article 3 of the Statute of the Council of Europe states:

Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

The consequences for states that do not uphold the commitment in Article 3 are potential suspension or expulsion. Under Article 8 of the Statute of the Council of Europe:

Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

It is arguable that denunciation of the ECHR would prevent a particular state from collaborating sincerely and effectively in protecting human rights. The Committee of Ministers has previously threatened to 'take all adequate measures' for failure to comply with a single judgment for a long period of time.⁶⁷ This makes it likely that denunciation of the ECHR would be considered at least as serious an issue as non-compliance with an important ECtHR judgment. Furthermore, if the level of human rights protection actually fell below that required by the ECHR this could also lead to the use of Article 8. Hence a continued membership in the Council of Europe may not be possible.

3.2 Implications for EU membership

Much like with membership in the Council of Europe there is no express link between membership of the European Union and being signed up to the ECHR. At the same time any country applying to become a new member of the EU must satisfy the requirements

⁶⁷ See, Committee of Ministers, Interim resolution 'CM/ResDH(2003)174', 12 November 2003 in relation to *Loizidou v Turkey* No 15318/89 (ECtHR, 23 March 1995), (1995) 20 EHRR 99.

of Article 49 of the Treaty on European Union TEU), which include 'respect for human rights'.⁶⁸ There is no express requirement to being party to the ECHR, but the EU's practice with candidate countries suggests that compliance with the ECHR is used as a benchmark for this assessment. Since the adoption of these criteria for EU accession, there has not been a single candidate country that was not signed up to the ECHR at the time of its application to join the EU. In addition, the EU Charter of Fundamental Rights provides that the ECHR is a minimum standard upon which EU human rights protection builds.⁶⁹ This suggests that membership of the ECHR is presupposed for membership of the EU.

Once a country is a member of the European Union it is obliged to respect the values of the EU, which include 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.⁷⁰ There is no express requirement that a Member State remain a party to the ECHR and no EU Member State has so far withdrawn from the ECHR so that there is no practice on which one could draw. At the same time it would not be logical if membership of the ECHR were a precondition for becoming a member of the EU, there would be no parallel requirement to remain one for the duration of a country's membership of the EU. This would suggest that being a party to the ECHR continues to be an implied obligation throughout EU membership even though it is not expressly laid down in the EU Treaties. Hence there are good reasons to suggest that if the United Kingdom withdrew from the ECHR, it would equally be in breach of its obligations as an EU Member State so that a continued membership in the EU might not be possible.

3.3 Impact on human rights protection

This section focuses on whether denunciation of and withdrawal from the ECHR would lead to a lowering of human rights protection. It uses the lens of anti-terrorism legislation and gay and lesbian rights to analyse this.

⁶⁸ Article 49 refers to the values in Article 2 TEU, which mentions respect for human rights.

⁶⁹ EU Charter of Fundamental Rights, Articles 52(3) and 53.

⁷⁰ Article 2 TEU.

3.3.1 Gay and lesbian rights

In terms of gay men and lesbians' rights, the impact of withdrawal from the ECHR could be profound. Withdrawing from the ECHR would remove vital legal protections that have been built up over the last three decades. A number of key legal reforms in the UK, which have ensured the equal treatment of gay men and lesbians, have been the result of litigation in the ECtHR. These reforms include the decriminalization of male homosexual acts,⁷¹ reform of the 'age of consent' for male homosexual acts,⁷² the removal of the ban on homosexuals serving in the armed forces,⁷³ and equality of treatment on the grounds of sexual orientation in the setting of child maintenance.⁷⁴ The ECHR protects gay men and lesbians from regressive action by future UK governments that may seek to 'roll back' these important developments in human rights protection.

The ECHR also protects gay men and lesbians from non-state actors. For example, the ECHR has been essential in safeguarding UK legislation designed to ensure equal treatment of gay men and lesbians in respect of the provision of goods and services.⁷⁵ This is an important protective function that might be lost should the UK withdraw from the ECHR.

Withdrawing from the ECHR would also prevent the UK from helping to improve the human rights situation of gay men and lesbians in Europe as a whole. For example, whilst the UK is contracted to the ECHR it is part of an emerging consensus in Europe about the need to provide legal recognition of same-sex relationships. The UK's legal recognition of same-sex relationships was cited by the ECtHR in *Vallianatos and Others v Greece* when it held that denying same-sex couples access to a 'civil union' was a violation of the ECHR.⁷⁶

⁷¹ *Dudgeon v UK*, Appl no 7525/76 (ECtHR, 22 October 1981), (1981) 4 EHRR 149; *ADT v UK*, Appl no 35765/97 (ECtHR, 31 July 2000), (2001) 31 EHRR 33.

⁷² *Sutherland v UK*, Appl no 25186/94 (ECtHR, 27 March 2001).

⁷³ *Smith and Grady v UK*, Appl no 33985/96 (ECtHR, 27 September 1999), (2000) 29 EHRR 49.

⁷⁴ *JM v UK*, Appl no 37060/06 (ECtHR, 28 September 2010).

⁷⁵ See *Ladele and McFarlane v United Kingdom*, ECHR 2013.

⁷⁶ *Vallianatos and Others v Greece*, Appl nos 29381/09 and 32684/09 (ECtHR, 7 November 2013), paras 25 and 91.

3.3.2 Counter-terrorism legislation

In terms of counter-terrorism legislation, the pressing question is whether withdrawal from the ECHR would alter the extent to which the government would be limited by rights, even in the most pressing times. Membership of the Council of Europe and the ECHR have been instrumental in a shift from the situation in which governments were fairly unrestrained to an acceptance that legitimisation and justification were necessary for counter-terrorism measures. The ECHR has since provided an important tool for advocates in terms of arguing at a policy level about what kind of measures states ought to introduce or, rather, ought not to introduce in spite of perceived exigency.

The ECtHR has not necessarily always enforced a situation of 'optimal' rights enforcement. For instance, Article 15 ECHR provides for derogation in time of emergency and the ECtHR has been particularly deferential to the interpretations of states here. Arguably, following *A v UK* the concept of an emergency could be construed as of endless duration, for example.⁷⁷ The ECHR however does provide an important safeguard in spite of this deferential attitude towards determining whether or not an emergency exists. For instance, as regards Article 3 of the ECHR the ECtHR has held firm against moves to undermine this in the UK. It has continued to enforce the principle from *Chahal v UK* that a person may not be deported to a country where they will face a real risk of torture or inhuman or degrading treatment.⁷⁸ This occurred most notably in the furore around the attempted deportation of Abu Qatada.⁷⁹ Hence withdrawal from the ECHR would reduce the ability of individuals confronted with anti-terror legislation to complain to an international court tasked with protecting these rights.

Conclusion

A withdrawal of the United Kingdom from the ECHR would deprive people in the UK from the possibility of taking their human rights complaints to the ECtHR. This would be accompanied by a substantial reduction of human rights protection, in particular for minority and vulnerable groups. Importantly, withdrawal would not relieve the UK of the

⁷⁷ *A v UK*, Appl no 3455/05 (ECtHR, 19 February 2009), (2009) 49 EHRR 29, para 178.

⁷⁸ *Chahal v UK*, Appl no 22414/93 (ECtHR, 15 November 1996), (1996) 23 EHRR 413.

⁷⁹ *Othman (Abu Qatada) v UK*, Appl no 8139/09 (ECtHR, 17 January 2012), (2012) 55 EHRR 1.

duty to comply with judgments already handed down by the European Court of Human Rights, for instance on prisoner voting.

Withdrawal from the ECHR is possible with six months' notice, but it would lead to wider consequences for the UK's other international commitments. The UK's long-term membership of the Council of Europe may become impossible. Moreover, a withdrawal from the ECHR may be incompatible with the UK's commitments as a member of the European Union and, as a result, the UK may be forced to leave the European Union.

Withdrawal would also affect the international standing and reputation of the UK. The UK would also be setting a negative example so that the protection of human rights within Europe as a whole might suffer. The UK would join Belarus with its highly questionable human rights record, which is currently the only state in Europe outside the jurisdiction of the ECtHR.